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316506—41——1

# In the Supreme Court of the United States

OCTOBER TERM, 1940

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No. 969

SOUTH ATLANTIC STEAMSHIP COMPANY OF DELAWARE, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court below (R. I, 175) is reported at 116 F. (2d) 480. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 121–144) are reported at 12 N. L. R. B. 1367.

### JURISDICTION

The decree of the Court below was entered on February 13, 1941 (R. I, 199). The petition for a

writ of certiorari was filed on April 21, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

## QUESTIONS PRESENTED

1. Whether, upon a valid finding that petitioner had discriminated between two unions in the issuance of passes permitting union representatives to board its ships and had thus interfered with the employees' freedom of choice of bargaining representatives, the Board could validly issue an order requiring petitioner to cease its discrimination and to grant equal treatment to the two organizations in the matter.

2. Whether, under the circumstances of this case, the Board abused its discretion in ordering petitioner to reinstate with back pay 23 employees whom the Board found to have been discharged in violation of Section 8 (3) and (1) of the Act.

The following questions are urged by petitioner, but are not, we think, properly presented:

3. Whether, in the absence of a valid closed-shop agreement, it is an unfair labor practice for an employer to discharge employees on account of their union affiliations, when such discharge is demanded, upon threat of strike, by a labor organization representing a majority of the employees in an appropriate bargaining unit.

4. Whether the collective bargaining agreement made by petitioner and 42 other steamship companies with the International Seamen's Union, covering hiring, wages, hours of employment, and working conditions for seamen both at sea and in port, is to be interpreted in accordance with Georgia law because one of the provisions of the agreement affecting petitioner was to be performed in Georgia.

5. Whether the Board's back-pay order is rendered invalid because of the absence of any provision for the deduction of any losses caused by any willful refusal of employees to seek or accept employment.

6. Whether the Board's back pay order is rendered invalid because of the absence of any finding as to whether the discharged employees had obtained "other regular and substantially equivalent employment."

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Supp. V, Sec. 151, *et seq.*) are set forth in the Appendix, *infra,* pp. 21–22.

## STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. I, 121–144). Omitting jurisdictional findings, the

facts, as found by the Board and concurred in by the court below, may be summarized as follows:[1]

On August 3, 1937, the crew of petitioner's vessel, the *Saccarappa,* signed shipping articles at Savannah, Georgia, for a foreign voyage, which commenced 2 days later (R. I, 126; II, 3). At that time there existed between petitioner and the International Seamen's Union of America, herein called I. S. U., a contract which contained the following provision, entitled "Preference":

> It is understood and agreed that, as vacancies occur, members of the International Seamen's Union of America, who are citizens of the United States, shall be given preference of employment, if they can satisfactorily qualify to fill the respective positions; *provided, however,* that this Section shall not be construed to require the discharge of any employee who may not desire to join the Union, or to apply to prompt reshipment, or absence due to illness or accident (R. I, 132; II, 129).

About September 20, 1937, the vessel returned from abroad to Charleston, South Carolina, where the crew signed off the articles (R. I, 126; II, 37, 3, 5, 32). Two members of the crew then quit their jobs (R. 126; II, 6, 68); the others remained at work in preparation for a coastwise trip, during which

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

cargo carried from abroad was to be discharged and freight loaded for the next foreign journey (R. I, 126; II, 6, 9–10, 57–58). The coastwise trip started about September 21, 1937 (R. I, 126; II, 3). En route between Charleston, South Carolina, and Wilmington, North Carolina, the members of the crew signed a coastwise pay roll (R. I, 126; II, 6, 55). On September 22, shortly after the *Saccarappa* arrived at Wilmington, an organizer for the National Maritime Union (N. M. U.) came on board and spoke to the men, following which the entire unlicensed crew joined the N. M. U. (R. I, 126; II, 6–7, 23, 64). The captain of the vessel, when informed by ship's delegate John Drews of the new union affiliation of the seamen, declared, "Whatever you fellows do has got nothing to do with me, anything you do is all right with me" (R. I, 127; II, 7; cf. II, 103–104).

While the *Saccarappa,* during the coastwise voyage, was temporarily at Newport News, Virginia, undergoing repairs, Drews asked Roger Cohan, petitioner's port superintendent, whether it made any difference to him to what union the men belonged (R. I, 127; II, 8–9). Cohan, according to Drews, replied that he was not interested in the men's union affiliation, and that "just as long as you do your work and attend to your business you have a job" (R. I, 127; II, 9). Members of the crew who heard this conversation testified that they interpreted Cohan's remarks as an assurance

that they would not be forced to leave the ship upon its return to Savannah (R. I, 127; II, 55, 48, 32). In response to similar questioning by Drews, the ship's captain declared that the work of each member of the crew was satisfactory, and that as far as he was concerned the men's jobs were secure (R. I, 128; II, 9). When the vessel arrived at Jacksonville and Drews was compelled to leave the ship because of illness in his family, the first assistant engineer dissuaded Drews from resigning and urged him to rejoin the ship at Savannah (R. I, 127; II, 10, 11). There is testimony that a third new seaman who joined the ship at Jacksonville was a member of the N. M. U. at the time he was taken on (R. I, 128).[2]

The *Saccarappa* arrived at Savannah on the morning of October 5, completing its coastwise voyage (R. I, 128; II, 3). Shortly after the arrival, Drews, having heard rumors that the men were to be discharged, again asked Port Superintendent Cohan whether the men's jobs were endangered by their having joined the N. M. U. (R. I, 128; II, 10–11). Cohan replied that the men would not lose their jobs, and that they would sign articles the following day for the next foreign voyage (R. I, 128; II, 10). During the day, when the men were paid for the coastwise trip, the cap-

[2] The testimony referred to is not in the printed record, but appears at pages 196–197 of the typewritten transcript of record filed in the office of the clerk.

tain and the first mate repeated Cohan's assurance that their positions were secure (R. I, 129; II, 11, 101, 57). The captain instructed the men to be on board the following morning at 10:00 a. m. to receive their physical examination and to sign the articles (R. I, 129; II, 101, 104). The men continued to work their regular shifts, and members of the unlicensed crew who went ashore that night left their belongings on shipboard (R. I, 129 II, 11, 28, 33, 55–56, 61). The captain testified that until about 10:00 a. m. of October 6 he had thought that the crew would make the next foreign voyage (R. I, 129; II, 106).

On the morning of October 6, a United States shipping commissioner, acting upon instructions from the captain and the agent of the I. S. U., refused to permit the unlicensed crew to sign shipping articles (R. I, 129; II, 13–14, 34, 57). When the men protested, the captain advised them that if they wanted to "sign on," they would have to rejoin the I. S. U. (R. I, 129; II, 13, 56, 104). The seamen declined to do so, whereupon they were ordered off the ship (R. I, 129; II, 14, 28, 49). They were paid for the number of hours they had worked after they had signed off the coastwise pay roll (R. I, 129–130; II, 13, 34). Early the next morning, October 7, the *Saccarappa* sailed from Savannah with an entirely new unlicensed crew (R. I, 130; II, 3).

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The Board found that the employment of the men did not terminate automatically at the end of a particular voyage, and that the members of the crew were employees of the respondent on October 6, 1937 (R. I, 131); that the men were refused permission to work, and were thereby discharged, because of their refusal to join the I. S. U. (R. I, 131); that the discharges were not required or justified by the provision of petitioner's contract with the I. S. U. according preference of employment to I. S. U. members (R. I, 132, *supra*, p. 4); that the agreement was never amended, either orally, in writing, or by the conduct of the parties, into a closed-shop agreement (R. I, 132–134); and that the discharge of the men constituted discrimination in regard to hire and tenure of employment, thereby encouraging membership in the I. S. U. and discouraging membership in the N. M. U., in violation of Section 8 (3) and (1) of the Act.[3] The Board further found that petitioner refused to grant passes to the N. M. U. to board its vessels and denied the N. M. U. access to its vessels for the

[3] The Board found that, even assuming that the employment of the men did terminate upon the completion of the voyage, the refusal to rehire the men for the next foreign voyage was not warranted by the contract, since the preferential hiring provision of that document was expressly made inapplicable to "prompt reshipment" (R. I, 134; II, 129). On the basis of an abundance of testimony, the Board found that the voyage which the men were prevented from making on October 6 was a "prompt reshipment" (R. I, 135–136; II, 91–93, 57–58, 14).

purpose of conferring with petitioner's crews, while granting these privileges to the I. S. U. (R. I, 139); that this discriminatory treatment was not required or justified by any provision of petitioner's contract with the I. S. U. (R. I, 139); and that by the conduct in question petitioner interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (1) (R. I, 139).

Upon the foregoing findings of fact, the Board ordered petitioner to cease and desist (a) from discouraging membership of its employees in the N. M. U. or any other labor organization by discrimination (R. I, 142); (b) from refusing to issue passes to representatives of the N. M. U. in equal numbers and under the same conditions as passes are issued to representatives of the I. S. U. (R. I, 142); and (c) from in any other manner interfering with the exercise by petitioner's employees of the rights guaranteed in Section 7 of the Act (R. I, 142). As affirmative action which it found would effectuate the policies of the Act, the Board ordered petitioner to offer reinstatement with back pay to the employees who were discriminatorily discharged (R. I, 143); to grant passes to N. M. U. representatives to the same extent that it grants passes to representatives of the I. S. U. (R. I, 144); and to post appropriate notices (R. I, 144).

On April 9, 1940, petitioner filed in the court

below a petition to review and set aside the Board's order (R. I, 2–23). The Board answered, requesting enforcement of its order (R. I, 29–35). On January 3, 1941, the court handed down its opinion and entered its decree enforcing the order of the Board with a modification not here material (R. I, 175–180, 199–201).

**ARGUMENT**

This case was decided by the same Circuit Court of Appeals which decided *Waterman Steamship Co.* v. *National Labor Relations Board,* 103 F. (2d) 157 (C. C. A. 5th), reversed, *National Labor Relations Board* v. *Waterman Steamship Co.,* 309 U. S. 206. The court below held that the essential issues of the present case—the interpretation of the "preference" clause of the contract and the discriminatory denial of passes to N. M. U. representatives—are governed by the *Waterman Steamship* decision (R. 179). This holding is manifestly correct.

The additional questions presented in the petition for certiorari which are not controlled by the *Waterman Steamship* case were either not urged before the Board or present no issue of general importance:

1. *Petitioner's alleged "right" to comply with the I. S. U.'s demand for the dismissal of N. M. U. members.*—The first branch of petitioner's argument on this point is that since the I. S. U. rep-

resented a majority of petitioner's employees on petitioner's six vessels, an appropriate unit,[4] it was entitled, even in the absence of a closed-shop agreement, to demand "with threat of strikes" that petitioner dismiss the N. M. U. members of the *Saccarappa* crew, and that petitioner's yielding to this threat was not an unfair labor practice (Pet. pp. 2–3, 10–12; Supp. Brief, pp. 2–7).

Petitioner admits that this contention was not passed upon by the Board, but asserts that it made "repeated requests" that the Board consider and make findings upon the issue (Supp. Br., p. 2). None of the record references listed by petitioner in its brief (*loc. cit. supra*) supports this assertion.[5]

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[4] Although the Board made no express finding upon the point, it apparently assumed, for purposes of its decision, that the appropriate bargaining unit was, as petitioner contends, the unlicensed seamen on all six of petitioner's vessels, and that the I. S. U. represented a majority of the employees within the unit.

[5] The five record references relied upon by petitioner do not support its claim that its present contention was urged before the Board. R. I, 20, refers to the Petition for Review filed with the lower court, not with the Board; moreover, it recites that the purpose of the I. S. U.'s strike threat was to force "recognition of the existence of a closed shop agreement between the I. S. U. and petitioner * * *." R. I, 93, refers to petitioner's exceptions to the Intermediate Report. The cited page is completely devoid of reference to any threat to strike. R. I, 160, 161, 162, refer to petitioner's Motion for Rehearing, filed subsequent to the issuance of the Board's decision and order. At R. 160 petitioner charges that the Board "overlooked" the fact that prior to September 20, 1937, all the members of the crew of the *Saccarappa*

As we point out in the margin, the cited references relate only to petitioner's contention that the men were denied employment pursuant to a valid closed shop contract between petitioner and the I. S. U., a contention which both the Board (R. I, 134) and the lower court (R. I, 179) considered and found to be without substance. Since petitioner did not contend before the Board that the dismissal of its employees in response to the I. S. U.'s strike threat was not an unfair labor practice, and no extraordinary circumstances are alleged to excuse petitioner's failure to urge the contention, the point may not be considered by this Court. Section 10 (e) of the Act; *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 662 (C. C. A. 9th).

In any event, the contention is without merit. "The act prohibits unfair labor practices in all cases. It permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing

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belonged to the I. S. U.; at R. 161 the same charge is made with respect to the I. S. U.'s alleged representation of a majority of the employees in an appropriate bargaining unit, and it is asserted that had petitioner refused to bargain collectively with the I. S. U. on October 6, 1937, it would have been guilty of an unfair labor practice. At R. 162 petitioner contends that had it failed to heed the I. S. U.'s demand for the dismissal of the N. M. U. crew it would have "acted in bad faith and violated its contractual obligation" and the I. S. U. would have called a strike and tied up petitioner's vessels, to the detriment of interstate commerce.

in the statute permits or justifies its violation by the employer." *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9th). And see *McQuay-Norris Manufacturing Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7th); *National Labor Relations Board* v. *McKesson & Robbins, Inc.*, decided May 5, 1941 (App. D. C.).

In the second part of the question (Pet., p. 3), petitioner takes the somewhat inconsistent position that the *Saccarappa* crew was dismissed pursuant to "a valid closed shop agreement" entered into on the morning of October 6, 1937, when the discharges occurred. Petitioner never advanced this contention before the Board. In its verified answer to the Board's complaint, petitioner asserted that the failure to reship the *Saccarappa's* crew was based on the fact that the employment status of the men terminated automatically upon the completion of a voyage and the signing off of shipping articles, and that its contract with the I. S. U. required it to give "preference of employment" to members of the I. S. U. in the hiring of another crew (R. I, 51–52).[6] Between the time of the filing of the answer and the commencement of the hearing, the Board issued its decision in *Matter of Peninsular and Occidental Steamship Company*, 5 N.

[6] Petitioner asserted that it "failed to reemploy the said employees * * * because of the reasons hereafter expressly stated in this answer, *and for no other reason*" (R. I, 50). [Italics added.]

L. R. B. 959, holding that the employment status of a ship's crew does not terminate automatically upon the completion of a voyage. Petitioner thereupon shifted its position and sought to prove at the hearing that, prior to October 6, 1937, the preferential hiring contract had been modified, either orally or by a course of dealing, into a closed-shop agreement. Both the Board (R. 134) and the court below (R. 179) found against this contention. The contention that a closed-shop contract was made on October 6, 1937, was urged neither before the Board nor in the petition to review filed in the court below (R. I, 2–23); the argument was advanced for the first time in the brief filed by petitioner in the lower court.

In any event, the facts as found by the Board and as summarized in the Statement amply support the conclusion of the court below that "the petitioner's yielding to the threat of strike and discharging these N. M. U. men under that threat, was not intended by the parties to be nor was it the making of an oral closed-shop agreement" (R. 179).

2. *The contention that the contract should have been construed according to the law of Georgia.*— The argument that the preferential hiring contract between petitioner and the I. S. U. was required to be construed according to the law of Georgia, the alleged place of performance, and that under Georgia law the contract contained an "im-

plied term" (Supp. Br., p. 8) requiring the seamen to remain members of the I. S. U. or else be subject to discharge, likewise was not raised before the Board. As late as November 17, 1939, nearly 6 months after the issuance of the Board's decision and order, and prior to the commencement of review proceedings in the court below, petitioner filed with the Board, in support of its motion for a rehearing, a document entitled "Brief of Respondent [petitioner] on Proper Construction of Preference Clause in Agreement of March 9, 1936, between I. S. U. and Respondent." In this brief, which dealt extensively and exclusively with the question of the proper construction of the agreement, there is no indication that petitioner regarded the contract as governed by Georgia law. This contention was made for the first time in petitioner's brief in the court below, filed after this Court had reversed the decision of the lower court in the *Waterman Steamship* case, 103 F (2d) 157, which petitioner had previously insisted was controlling (Pet.'s Motion for Rehearing, R. I, 156). In view of these facts it is perhaps superfluous to point out that petitioner's assertion as to the intent of the parties concerning the *lex loci contractus* (Supp. Br., p. 8) is unsupported by any record citations; that the single Georgia decision upon which petitioner relies—*Gary* v. *Central of Georgia Railway Co.*, 44 Ga. App. 120—is factually remote from the instant case and is of doubt-

ful authority for petitioner's contentions; and that the contract in question was executed between the I. S. U. and 43 steamship companies, including petitioner, and deals with hiring, wages, hours of employment and working conditions, both at sea and in port, of all seamen employed by the various companies (R. II, 127–137).

3. *Alleged invalidity of the order for reinstatement and back pay.*—The question sought to be raised by subsections (a) and (b) of petitioner's third point (Pet. p. 4), namely, whether the Board has any discretion with respect to the ordering of reinstatement and back pay to employees who have been discharged in violation of the Act or whether it must order such relief as a matter of course, is not presented by the facts of the instant case. The Board did not order reinstatement and back pay in the case at bar because it thought such relief was mandatory under the Act, but because "Upon the basis of the * * * findings of fact and conclusions of law and pursuant to Section 10 (c) of the * * * Act" (R. 142), it was of the opinion that the affirmative action ordered would "effectuate the policies of the Act" (*ibid.*). The Board has never taken the position that Section 10 (c) requires the issuance of reinstatement and back pay orders in all cases; rather, as this Court pointed out in *Phelps Dodge Corp.* v. *National Labor Relations Board,* Nos. 387, 641, this Term, "in applying its authority over back pay orders, the Board has

not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations."

Subsection (c) (1) of petitioner's third point (Pet., p. 4) is that the Board abused its discretion in ordering back pay, in view of the fact that petitioner was allegedly "the innocent victim of a dispute between rival unions." Petitioner apparently believes that the loss of wages should be borne by the employees, who merely exercised the rights guaranteed them under the Act, rather than by petitioner, who discharged them in violation of the Act. The Board's conclusion that under the particular circumstances of this case the loss should be borne by the law violator rather than by the innocent employees, was obviously a proper exercise of its discretion. *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9th); *McQuay-Norris Manufacturing Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7th); *National Labor Relations Board* v. *McKesson & Robbins, Inc.*, decided May 5, 1941 (App. D. C.); cf. *Phelps Dodge Corp.* v. *National Labor Relations Board*, Nos. 387, 641, this Term.

Subsection (c) (2) of petitioner's third point (Pet., p. 4) is likewise not properly presented in this case. Neither in its Answer to the Board's complaint, in its Exceptions to the Intermediate Report, nor at any other stage of the proceeding before the Board did petitioner contend that the

employees ordered reinstated had obtained "any other regular and substantially equivalent employment," request the Board to make a finding upon the point, or argue that the obtaining of such employment barred or in any way limited the Board's power to order affirmative action. Nor did the court below mention the matter in its opinion.

With respect to subsection (d) of its third point, petitioner does not, either in its petition or supporting brief, point to evidence of a wilful refusal by any employee to seek or accept employment. Nor did petitioner point to any such instance while the proceeding was before the Board, or ask the Board to make a finding with respect thereto. The only reference which petitioner made to the matter in the course of the administrative proceeding was the general statement in its Exceptions to the Intermediate Report (R. I, 106) that the Board's back-pay order was invalid because, *inter alia,* "if back pay is awarded the complaining seamen, there should be deducted therefrom not only the amount which they actually earned during the said period, but the amount which they could have reasonably earned during the said period." No specific instance was mentioned and the exception is unsupported by any references to the record. Obviously, the burden rested upon petitioner to bring to the attention of the Board any instance in which an employee failed without excuse to seek equivalent em-

ployment. Cf. *Phelps Dodge Corp.* v. *National Labor Relations Board,* Nos. 387, 641, this Term.

The question posed in subsection (e) of the third point (Pet. 5) is not presented by this record. The findings which "justify" the Board's award of reinstatement with back pay are those which are set out in its opinion holding that petitioner had violated Section 8 (3) by discriminatorily discharging the 23 members of the crew of the *Saccarappa* (R. I, 126–138). The Board found specifically that this award would "effectuate the policies of the Act" (R. I, 142).

4. *Alleged invalidity of the order to grant passes.*—While petitioner seeks to present this matter as if it involved the broad question of the scope of a shipowner's duty under the Act to grant passes to board its vessels to the various representatives of its employees (Supp. Br., p. 15–16), the issue actually involved is much narrower. All that the Board decided was that petitioner had unlawfully discriminated between the I. S. U. and the N. M. U. by issuing passes and granting access to its vessels to representatives of the former, while denying these rights to representatives of the latter. The order merely requires petitioner to cease this discrimination and grant equal treatment to each of the competing organizations. This is the same question which was presented and decided in the *Waterman Steamship* case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1941.